



COMPARATIVE LAW
Academic Year 2023/2024
11 of January 2024

Consider the excerpts below and respond to the following questions:

«In the Common Law tradition, a contract is said to be ‘a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty’. In order for a promise or a set of promises to originate a contract, the ‘mutual assent’ or the ‘meeting of the minds’ of the parties is necessary.

However, the mutual consent of the parties alone is not sufficient for this purpose. Rather, a consideration, in the sense of a quid pro quo, is also required.”

DÁRIO MOURA VICENTE

In Comparative Law of Obligations (EE Publishing – 1st edition, pps.38-39)

«Consideration is defined as some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other¹”.

CURRIE V. MISA (House of Lords, 1874)

¹ As discussed in class, the issue in this case was whether the existing debt constituted sufficient consideration for the security so as to constitute a legally enforceable contract for the creditor.

Reply to the following questions:

- a) Is there a functional equivalent, in the civil law tradition, to the Common Law requirement of consideration?

Criteria: *Comparative Law of Obligations*, by Professor Dário Moura Vicente (vol. II), pps.41-43

In Common law systems, if there is a meeting of the minds without consideration there will accordingly be an agreement but not an enforceable contract. This is the opposite of the concept of contract endorsed by the civil law tradition which emphasized mutual consent – even though it is discussed whether contracts generally require a cause’, such a concept is not functionally equivalent to consideration.

A number of corollaries of the Common Law requirement of consideration have no parallels in continental European laws, as a result of the consensus principle that governs the latter – please read the manual on these points in pages 41 and 42.

- b) According to the excerpts above, what exactly is consideration for the family of Common Law?

Criteria: *Comparative Law of Obligations*, by Professor Dário Moura Vicente (vol. II), ps. 38-40

According to a classical definition, reflected in the *Currie v. Misa* ruling, it is a unique product of Common Law, which reveals the latter’s strong suffusion with economic concerns and consists of a ‘benefit to the promisor or a detriment to the promisee’, given in exchange for the contractual promise. A more modern approach defines it simply as the price for which the counterparty’s promise is bought. In English law, as inferred by the first excerpt, the mere promise of a consideration to be rendered by the promise constitutes good consideration, in which case one speaks of an executory consideration. It may also consist in the practice of an act by the promisee at the time of formation of the contract, which is then termed executed consideration. In essence, it refers to the *quid pro quo* pursued by the parties entering into such contract.

c) Why does the requirement of consideration apply in Common Law systems and not in Civil Law ones?

Criteria: *Comparative Law of Obligations*, by Professor Dário Moura Vicente (vol. II), pps.44-46

Two explanations may be put forward in this regard. Firstly, from a philosophical perspective, there is the well-known contrast between continental European idealism and English utilitarianism.

The second explanation for the diversity of regimes is historical. Indeed, in French law the contract system was largely influenced by canonists, whereas in English law it has been mainly inspired by commercial custom. Hence, in French law contract is a general institution comprising every agreement by which two or more persons subject themselves to some obligation, while English judges saw the commercial transaction as the paradigm of the contract, with its regulation shaped by case law.

Quotation:

Question a)– 6 value points

Question c)– 6 value points

Duration: 90 minutes

Question b)– 6 value

General organization and correction of the answers – 1 value